porate accumulated and capitalised interests must bear out the evidence of the Manager. In any event, notice of dishonour of cheques drawn over the approved or agreed limits, if there is such a requirement in law or equity in the circumstances, is dispensed with by the clause above referred to, enabling the Bank contractually to refuse, in its absolute discretion, any request for advances.

We therefore allow the appeal with costs here and in the court below.

Appeal allowed.

Solicitors: *Shook Lin & Bok; N. Ramachandran & Co.*

BANK BUMIPUTRA MALAYSIA BHD. v. MAJLIS AMANAH RA'AYAT

[F.C. (Raja Azlan Shah Ag. C.J. (Malaya), Wan Suleiman and Chang Min Tat F.J.J.) May 30 and August 30, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 215 of 1977]

Practice and Procedure — Application to set aside judgment in default — Reasons for not defending — Merits of defence — R.S.C., 1957, O. 13 r. 11.

Contract — Guarantee — Limitation of time for demand under guarantee — Whether valid — Contracts Act, 1950, s. 29.

The appellants claimed a sum of $73,402.80 being the amount allegedly owed by Syarikat Baiduri (M) Sdn. Bhd. on an overdraft account. The respondents were sued as the guarantors of the company. Judgment in default was obtained by the appellants and the respondents applied that the judgment be set aside. The respondents tried to explain why the action was not defended and also alleged that they had a good defence to the action. The application was allowed in the High Court and the appellants appealed to the Federal Court.

Held: (1) an appellate court could only interfere in this case with the exercise of the discretion if the court below had clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration;

(2) in dealing with the application the learned judge committed no error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle;

(3) all the elements were present which would justify the exercise of the discretion in favour of the respondents.

FEDERAL COURT.

Miss Swee Chew Yoke for the appellants.

Mohamed Ismail (S.P. Woo with him) for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah Ag. C.J. (Malaya) (delivering the judgment of the Court): This was an appeal from an order of the High Court at Kuala Lumpur allowing the application by the respondents, as the second defendants in the action, that the judgment entered against them in default of appearance be set aside. We dismissed the appeal on May 30, 1978.

The appellants claimed a sum of $73,402.80 being the amount alleged to be owing by the first defendants, Syarikat Baiduri (M) Sdn. Bhd., on an overdraft account. The respondents were sued as guarantors for the first defendants. The specially endorsed writ was filed on March 16, 1976 and served on the respondents on March 31, 1976. On June 23, 1976, the appellants obtained judgment against the respondents in default of appearance.

The application to set aside the judgment was made by summons-in-chambers dated October 18, 1977. One ground stated in the affidavit in support of the application is that at the time when the writ was served the respondents were engaged in major administrative reorganisation, and from March 22, 1976 till the end of June 1976 they were busy transferring files and personnel from the Contracts Unit to the newly set up Overdraft Unit of the Loans Division and in the process this matter lost the attention which otherwise would have been given. Another ground is that the writ when served, was handed to an officer who was no longer with the relevant division and he had failed to forward it to the appropriate officer. All of these alleged facts were not refuted by the appellants. As to the merits of defence the respondents relied on Clause 13 of the guarantee agreement executed by them on January 11, 1974, which reads as follows: —

"This Guarantee shall be valid for a period of eight calendar months from the data hereof, computing for this purpose, the month in which this guarantee is executed by us (irrespective of the number of days of the month then remaining) as one calendar month and any demand hereunder to be valid shall be made not later than thirty days from the date of the expiry of the period of this Guarantee."

According to evidence the demand was made on the respondents on June 17, 1975. It was therefore contended by them that the demand was made out of time. Learned counsel for the appellants argued that the time limit was null and void in view of section 29 of the Contracts Act, which reads:

"Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

The learned judge held that Clause 13 of the guarantee agreement was not caught within the ambit of the provisions of section 29 of the Contracts Act. That in my opinion is a question of law. The true construction of a document is a question of law for the court, and it is no part of the court's function at this stage of the litigation to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

In any event the learned judge found that *prima facie* there was an issue which should go for trial. He also found that the grounds relied upon by the respondents were sufficient grounds for setting aside the judgment in default.

It is clear that the application to set aside the judgment in default was made under Order 13 rule 10 of the Rules of the Supreme Court. The rule provides: —

"Where judgment is entered pursuant to any of the preceding Rules of this Order, it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just."

The rule gives the court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits. An appellate court can only interfere with the exercise of the discretion if the court below has clearly acted on some wrong principle, committed some error of law or failed to consider matters which demanded consideration. I cannot think that in dealing with the application under Order 13 rule 10 the learned judge committed any error of law. Neither did he fail to consider all matters demanding consideration nor act on any wrong principle. In my view all the elements are present in this case which would justify the exercise of discretion in favour of the respondents.

In my view, the respondents have disclosed a defence on the merits.

Wan Suleiman and **Chang Min Tat F.JJ.** concurred.

Order accordingly.

Solicitors: *Nik Hussain, Ibrahim & Abdullah; Zain & Co.*

TONG LEE HWA & ANOR. v. LEE YOKE SAN

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.) March 22 and September 1, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 127 of 1977]

Practice and Procedure — Res Judicata — What constitutes.

The respondent in this case claimed for work done as a valuer at the request of the appellants. There was a question as to whether the work was done for the appellants personally or for a company known as Chi Liung & Sons Sdn. Bhd. or for the estate of Chi Liung. On an application by the respondent to sign final judgment an order of court was made on March 26, 1973 that the application be withdrawn with liberty to join the other parties involved in the Probate Suit relating to the estate of Chi Liung. The respondent did not avail himself of this liberty but instead made an application by way of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the motion, an order in terms was made ([1978] 2 M.L.J. 112). The appellants appealed and at the appeal chose to rely on *res judicata* on the ground that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion.

Held, dismissing the appeal: it had not been shown that the earlier judgment necessarily and with precision determined the point in issue, that is, the liability of the appellants to pay the respondent for work done at their request and therefore the plea of *res judicata* must fail.

Case referred to:-

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993; [1964] M.L.J. 49.

FEDERAL COURT.

P.S. Abraham for the appellants.

S.D.K. Peddie for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): At the appeal, counsel for the appellants elected deliberately to rely only on *res judicata.*

He had another ground of appeal. It was to the effect that the claim of the respondent against the appellants for work done at the request of the appellants should not be met by the appellants as it was done for and on behalf of a company known as Chi Liung & Sons Sdn. Bhd. and also for and on behalf of the estate of Chi Liung. The appointment of the respondent was by the appellants and though the former accepted the appointment as valuer for the estate, there was nothing in the letter dated May 28, 1970 to indicate that the appointment was as such valuer. Having regard to the agreement between the beneficiaries of the estate made on December 15, 1969 that the parties were to act in their personal capacities or their representative capacities or both, and the terms of the said letter, the appointment was more likely to be as valuer of and not for the estate.

Undoubtedly, counsel for the appellants considered that the law was against him on this contention. He therefore chose to rely entirely on the application of the principle of *res judicata.* The contention was directed to an application by the plaintiff to sign final judgment, on which the order of the court made on March 26, 1973 was that the application was withdrawn with liberty to join the other parties involved in the Probate Suit involving the estate of Chi Liung.

The respondent however did not avail himself of the liberty and instead made an application by notice of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the notice of motion, an order in terms was made. From that order, this appeal lay and it was said that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion.

At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*,[1] "necessarily and with precision" determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

We did not feel any necessity to call on counsel for the respondent and we accordingly dismissed the appeal.

Appeal dismissed.

Solicitors: *T. Tharu & Co.; Skrine & Co.*